

**PUBLIC LANDS LITIGATION**

2010 GENERAL SESSION

STATE OF UTAH

**Chief Sponsor: Kenneth W. Sumsion**

Senate Sponsor: \_\_\_\_\_

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**LONG TITLE**

**General Description:**

This bill directs the attorney general to file certain eminent domain actions.

**Highlighted Provisions:**

This bill:

▶ directs the attorney general to file:

• certain eminent domain actions to facilitate the state's ability to manage school and institutional trust lands; and

• an action to enforce a section of the Utah Enabling Act.

**Monies Appropriated in this Bill:**

None

**Other Special Clauses:**

None

**Utah Code Sections Affected:**

ENACTS:

**67-5-29**, Utah Code Annotated 1953

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*Be it enacted by the Legislature of the state of Utah:*

Section 1. Section **67-5-29** is enacted to read:

**67-5-29. Duty to legal actions.**

(1) The attorney general shall file an action to enforce Section 9 of the Utah Enabling



28 Act.

29 (2) In accordance with Title 78B, Chapter 6, Part 5, Eminent Domain, the attorney  
30 general shall file an eminent domain action on property possessed by the federal government  
31 that:

32 (a) facilitates the state's ability to manage the school and institutional trust lands  
33 consistent with the state's fiduciary responsibilities towards the beneficiaries of the trust lands;  
34 and

35 (b) (i) provides access to school and institutional trust lands; or

36 (ii) increases the profitability of the school and institutional trust lands.

37 (3) The attorney general shall file an eminent domain action described in Subsection  
38 (2) for a fee simple on property possessed by the federal government:

39 (a) for a highway:

40 (i) on Spring Creek Road located in the western half of section 3, township 38 south,  
41 range 12 west to provide access to section 2, township 38 south, range 12 west; and

42 (ii) off of Old Canyon Road located in the northeast quarter of the southeast quarter of  
43 section 5, township 10 north, range 5 east to provide access to the southeast quarter of the  
44 southeast quarter of section 32, township 11 north, range 5 east; and

45 (b) for natural resource development on:

46 (i) the northeast quarter, the northwest quarter, and the southwest quarter of section 14,  
47 township 23 south, range 17 east;

48 (ii) the southeast quarter of section 15, township 23 south, range 17 east;

49 (iii) section 20, township 23 south, range 17 east;

50 (iv) section 21, township 23 south, range 17 east;

51 (v) section 22, township 23 south, range 17 east;

52 (vi) section 23, township 23 south, range 17 east;

53 (vii) section 24, except the northwest quarter of the northwest quarter of section 24,  
54 township 23 south, range 17 east;

55 (viii) section 25, township 23 south, range 17 east;

56 (ix) section 26, township 23 south, range 17 east;

57 (x) section 28, township 23 south, range 17 east;

58 (xi) section 35, township 23 south, range 17 east;

- 59 (xii) section 7, township 23 south, range 18 east;
- 60 (xiii) section 15, township 23 south, range 18 east;
- 61 (xiv) section 17, township 23 south, range 18 east;
- 62 (xv) section 18, township 23 south, range 18 east;
- 63 (xvi) section 19, township 23 south, range 18 east;
- 64 (xvii) section 20, township 23 south, range 18 east;
- 65 (xviii) section 21, township 23 south, range 18 east;
- 66 (xix) section 22, township 23 south, range 18 east;
- 67 (xx) section 29, township 23 south, range 18 east;
- 68 (xxi) section 30, township 23 south, range 18 east;
- 69 (xxii) section 31, township 23 south, range 18 east;
- 70 (xxiii) section 1, township 24 south, range 17 east;
- 71 (xxiv) section 3, township 24 south, range 17 east;
- 72 (xxv) section 4, township 24 south, range 17 east;
- 73 (xxvi) section 5, township 24 south, range 17 east;
- 74 (xxvii) section 8, township 24 south, range 17 east;
- 75 (xxviii) section 9, township 24 south, range 17 east;
- 76 (xxix) section 10, township 24 south, range 17 east;
- 77 (xxx) section 11, township 24 south, range 17 east;
- 78 (xxxi) section 12, township 24 south, range 17 east;
- 79 (xxxii) section 13, township 24 south, range 17 east;
- 80 (xxxiii) section 14, township 24 south, range 17 east;
- 81 (xxxiv) section 15, township 24 south, range 17 east;
- 82 (xxxv) section 17, township 24 south, range 17 east;
- 83 (xxxvi) section 21, township 24 south, range 17 east;
- 84 (xxxvii) section 22, township 24 south, range 17 east;
- 85 (xxxviii) section 23, township 24 south, range 17 east;
- 86 (xxxix) section 24, township 24 south, range 17 east;
- 87 (xl) the northeast quarter, the northeast quarter of the northwest quarter, and the
- 88 southeast quarter of section 25, township 24 south, range 17 east;
- 89 (xli) section 27, township 24 south, range 17 east;

- 90 (xlii) section 28, township 24 south, range 17 east;
- 91 (xliii) section 29, township 24 south, range 17 east;
- 92 (xliv) section 33, township 24 south, range 17 east;
- 93 (xlv) section 34, township 24 south, range 17 east;
- 94 (xlvi) section 35, township 24 south, range 17 east;
- 95 (xlvii) section 1, township 24 south, range 18 east;
- 96 (xlviii) section 3, township 24 south, range 18 east;
- 97 (xlix) section 4, township 24 south, range 18 east;
- 98 (l) section 5, township 24 south, range 18 east;
- 99 (li) section 6, township 24 south, range 18 east;
- 100 (lii) section 7, township 24 south, range 18 east;
- 101 (liii) section 8, township 24 south, range 18 east;
- 102 (liv) section 9, township 24 south, range 18 east;
- 103 (lv) section 10, township 24 south, range 18 east;
- 104 (lvi) section 11, township 24 south, range 18 east;
- 105 (lvii) section 12, township 24 south, range 18 east;
- 106 (lviii) section 13, township 24 south, range 18 east;
- 107 (lix) section 14, township 24 south, range 18 east;
- 108 (lx) section 15, township 24 south, range 18 east;
- 109 (lxi) section 17, township 24 south, range 18 east;
- 110 (lxii) section 18, township 24 south, range 18 east;
- 111 (lxiii) section 19, township 24 south, range 18 east;
- 112 (lxiv) section 20, township 24 south, range 18 east;
- 113 (lxv) section 21, township 24 south, range 18 east;
- 114 (lxvi) section 22, township 24 south, range 18 east;
- 115 (lxvii) section 23, township 24 south, range 18 east;
- 116 (lxviii) section 24, township 24 south, range 18 east;
- 117 (lxix) section 25, township 24 south, range 18 east;
- 118 (lxx) section 26, township 24 south, range 18 east;
- 119 (lxxi) section 27, township 24 south, range 18 east;
- 120 (lxxii) section 28, township 24 south, range 18 east;

- 121 (lxxiii) section 29, township 24 south, range 18 east;
- 122 (lxxiv) section 30, township 24 south, range 18 east;
- 123 (lxxv) section 31, township 24 south, range 18 east;
- 124 (lxxvi) section 33, township 24 south, range 18 east;
- 125 (lxxvii) section 34, township 24 south, range 18 east;
- 126 (lxxviii) section 35, township 24 south, range 18 east;
- 127 (lxxix) section 1, township 24 south, range 19 east;
- 128 (lxxx) section 3, township 24 south, range 19 east;
- 129 (lxxxii) section 4, township 24 south, range 19 east;
- 130 (lxxxiii) section 5, township 24 south, range 19 east;
- 131 (lxxxiv) section 6, township 24 south, range 19 east;
- 132 (lxxxv) section 7, township 24 south, range 19 east;
- 133 (lxxxvi) section 8, township 24 south, range 19 east;
- 134 (lxxxvii) section 9, township 24 south, range 19 east;
- 135 (lxxxviii) section 10, township 24 south, range 19 east;
- 136 (lxxxix) section 11, township 24 south, range 19 east;
- 137 (lxxxix) section 12, township 24 south, range 19 east;
- 138 (xc) section 13, township 24 south, range 19 east;
- 139 (xci) section 14, township 24 south, range 19 east;
- 140 (xcii) section 15, township 24 south, range 19 east;
- 141 (xciii) section 17, township 24 south, range 19 east;
- 142 (xciv) section 18, township 24 south, range 19 east;
- 143 (xcv) section 19, township 24 south, range 19 east;
- 144 (xcvi) section 20, township 24 south, range 19 east;
- 145 (xcvii) section 21, township 24 south, range 19 east;
- 146 (xcviii) section 22, township 24 south, range 19 east;
- 147 (xcix) section 23, township 24 south, range 19 east;
- 148 (c) section 24, township 24 south, range 19 east;
- 149 (ci) section 25, township 24 south, range 19 east;
- 150 (cii) section 28, township 24 south, range 19 east;
- 151 (ciii) section 29, township 24 south, range 19 east;

- 152           (civ) section 30, township 24 south, range 19 east;
- 153           (cv) section 31, township 24 south, range 19 east;
- 154           (cvi) section 33, township 24 south, range 19 east;
- 155           (cvii) section 34, township 24 south, range 19 east;
- 156           (cviii) section 35, township 24 south, range 19 east;
- 157           (cix) section 7, township 24 south, range 20 east;
- 158           (cx) the northwest quarter, the southwest quarter, and the southeast quarter of section
- 159 8, township 24 south, range 20 east;
- 160           (cxi) section 17, township 24 south, range 20 east;
- 161           (cxii) section 18, township 24 south, range 20 east;
- 162           (cxiii) section 19, township 24 south, range 20 east;
- 163           (cxiv) section 20, township 24 south, range 20 east;
- 164           (cxv) section 21, township 24 south, range 20 east;
- 165           (cxvi) section 29, township 24 south, range 20 east;
- 166           (cxvii) section 30, township 24 south, range 20 east;
- 167           (cxviii) section 31, township 24 south, range 20 east;
- 168           (cxix) section 1, township 25 south, range 17 east;
- 169           (cxx) section 1, township 25 south, range 19 east;
- 170           (cxxi) the north half of the northeast quarter and the northwest quarter of section 2,
- 171 township 25 south, range 19 east;
- 172           (cxxii) section 3, except the southwest quarter of the northeast quarter of section 3,
- 173 township 25 south, range 19 east;
- 174           (cxxiii) section 4, township 25 south, range 19 east;
- 175           (cxxiv) section 5, township 25 south, range 19 east;
- 176           (cxxv) section 12, township 25 south, range 19 east; and
- 177           (cxxvi) section 13, except the northeast quarter of the southeast quarter of section 13,
- 178 township 25 south, range 19 east.

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**Legislative Review Note**  
**as of 2-10-10 3:34 PM**

As required by legislative rule and practice, the Office of Legislative Research and General Counsel provides the following legislative review note to assist the Legislature in making its own determination as to the constitutionality of the bill. The note is based on an analysis of relevant state and federal constitutional law as applied to the bill. The note is not written for the purpose of influencing whether the bill should become law, but is written to provide information relevant to legislators' consideration of this bill. The note is not a substitute for the judgment of the judiciary, which has authority to determine the constitutionality of a law in the context of a specific case.

This bill authorizes the state to exercise eminent domain authority on property possessed by the federal government unless the property is owned by the federal government in accordance with the U.S. Constitution article I, section 8, clause 17, also known as the "Enclave Clause." The U.S. Supreme Court has held that eminent domain authority, or the right to take and dispose land for public use and necessity, belongs to the sovereign government of the land (i.e. federal or state government). *See Pollard v. Hagan*, 44 U.S. 212, 223 (1845). This bill contests the U.S. Supreme Court's opinion that the federal government is the sovereign of public land or property acquired by the federal government in accordance with federal constitutional authority other than the Enclave Clause.

In 1894 the U.S. Congress passed the Utah Enabling Act. Act Cong. July 16, 1894, ch. 138, 28 Stat. 107. The Act declared that as a condition of Utah's acceptance into the Union, the people of Utah "agree[d] that they forever disclaim[ed] all right and title to the unappropriated public lands lying within the boundaries thereof; and to all lands lying within said limits owned or held by any Indian or Indian tribes; and that until the title thereto shall have been extinguished by the United States, the same shall be and remain subject to the disposition of the United States . . . ." *Id.* at § 3. At this time, Utah also adopted the U.S. Constitution as a condition to joining the Union. *Id.*

Two clauses in the U.S. Constitution empower the federal government to own and retain land. The first, the Enclave Clause, authorizes the federal government to "purchas[e] by the Consent of the Legislature of the State" land for specific and enumerated purposes like military structures "and other needful Buildings." U.S. Const. art. I, sec. 8, cl. 17. This bill would not affect lands acquired by the federal government in accordance with the Enclave Clause.

The second, the "Property Clause," authorizes Congress "to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States . . . ." U.S. Const. art. IV, sec. 3, cl. 2. Unlike the Enclave Clause, the Property Clause does not require that the federal government receive a state legislature's consent to own land. The U.S. Supreme Court has held that "Congress has the same power over [territory] as over any other property belonging to the United States; and this power is vested in Congress without limitation . . . ." *United States v. Gratiot*, 39 U.S. 526, 537 (1840). *See also Kleppe v. New Mexico*, 426 U.S. 529, 539 (1976). Pursuant to its broad authority under the Property Clause, Congress may enact legislation to manage or sell federal land, and any legislation Congress enacts "necessarily overrides conflicting state laws under the Supremacy Clause." *Kleppe*, 426 U.S. at 543. *See* U.S. Const. art. VI, cl. 2.

Parties contesting federal control or ownership of public lands under the Property Clause have argued that the equal footing doctrine requires Congress' recognition of a state's sovereignty over public lands. "The equal footing doctrine is grounded in the idea that new states enter the Union with the same rights as the original states." Koch v. United States, DOI, Interior Bd. of Land Appeals, BLM, 47 F.3d 1015, 1018 (10th Cir. 1995) (citations omitted). The courts, however, have limited the equal footing doctrine to apply only to the title of land underlying navigable waters: "The equal footing doctrine simply does not cause land in non-navigable waters to pass from the federal government to the state." *Id.* at 1019. *See also Texas v. Louisiana*, 410 U.S. 702, 713 (1973). Furthermore, the equal footing doctrine requires political, not economic or geographic, equality between the states. United States v. Texas, 339 U.S. 707, 716 (1950). *See also Texas v. Louisiana*, 410 U.S. at 713.

Based on the courts' previous application of the Property Clause, there is a high probability that a court would hold that the federal government is the sovereign of public lands surrendered to or withheld by the federal government at the time of Utah's acceptance into the Union. *See generally United States v. Nye County*, 920 F. Supp. 1108, 1109 (D. Nev. 1996); Gibson v. Chouteau, 80 U.S. 92 (1872). In short, the state has no standing as sovereign to exercise eminent domain or assert any other state law that is contrary to federal law on land or property that the federal government holds under the Property Clause.

**Office of Legislative Research and General Counsel**

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**H.B. 324 - Public Lands Litigation**

**Fiscal Note**

2010 General Session  
State of Utah

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**State Impact**

Enactment of this bill is estimated to cost \$750,000 from restricted revenue. Appropriations contained in H.B. 323 are intended to cover such costs. The Legislative General Counsel has attached a detailed Legislative Review Note to this bill. If provisions of the bill are challenged in court, there will be costs associated with defending those provisions.

|                  | <u>FY 2010<br/>Approp.</u> | <u>FY 2011<br/>Approp.</u> | <u>FY 2012<br/>Approp.</u> | <u>FY 2010<br/>Revenue</u> | <u>FY 2011<br/>Revenue</u> | <u>FY 2012<br/>Revenue</u> |
|------------------|----------------------------|----------------------------|----------------------------|----------------------------|----------------------------|----------------------------|
| Restricted Funds | \$0                        | \$750,000                  | \$0                        | \$0                        | \$0                        | \$0                        |
| <b>Total</b>     | <b>\$0</b>                 | <b>\$750,000</b>           | <b>\$0</b>                 | <b>\$0</b>                 | <b>\$0</b>                 | <b>\$0</b>                 |

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**Individual, Business and/or Local Impact**

Enactment of this bill likely will not result in direct, measurable costs and/or benefits for individuals, businesses, or local governments.